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Federal Communications Commission
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**Before the
Federal Communications Commission
Washington, D.C. 20554**

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Federal Communications Commission
Bureau / Office

In the Matter of)

M2Z NETWORKS, INC.)

Application for License and Authority to)
Provide National Broadband Radio Service)
In the 2155-2175 MHz Band)

WT Docket No. 07-16

Petition for Forbearance Under)
47 U.S.C. § 160(c) Concerning Application of)
Sections 1.945(b) and (c))
Of the Commission's Rules and Other)
Regulatory and Statutory Provisions)

WT Docket No. 07-30

and)

NEXTWAVE BROADBAND INC.)

WT Docket No. _____

Application for License and Authority to)
Provide Nationwide Broadband Service)
In the 2155-2175 MHz Band)

File No. _____

and)

OPEN RANGE COMMUNICATIONS, INC.)

WT Docket No. _____

Application for License to Construct and)
Operate Facilities for the Provision of Rural)
Broadband Radio Services in the 2155-2175)
MHz Band)

File No. _____

and)

COMMNET WIRELESS, LLC)

WT Docket No. _____

Application for License and Authority to)
Construct and Operate a System to Provide)
Nationwide Broadband Service in the)
2155-2175 MHz Band)

File No. _____

and)

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**CONSOLIDATED MOTION OF M2Z NETWORKS, INC.
TO DISMISS ALTERNATIVE PROPOSALS**

**W. Kenneth Ferree
Erin L. Dozier
Christopher G. Tygh
Sheppard Mullin Richter & Hampton LLP
1300 I Street, N.W.
11th Floor East
Washington, DC 20005
(202) 218-0000**

Uzoma C. Onyeije
Vice President, Regulatory Affairs
M2Z Networks, Inc.
2000 North 14th Street
Suite 600
Arlington, VA 22201
(703) 894-9500

Its Attorneys

March 26, 2007

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EXECUTIVE SUMMARY

There are problem solvers, and then there are opportunists. M2Z is a problem solver, having filed its Application that will, when granted, help remedy lagging U.S. broadband deployment. The parties who have filed Alternative Proposals attempting to piggyback on the M2Z Application did so to slow the realization of M2Z's bold and innovative proposal, enter into a beneficial negotiation with M2Z, or extend their own spectrum holdings. The Commission should not allow the regulatory gamesmanship of these parties to stand in the way of satisfying its paramount duty of serving the public interest.

The record in this proceeding is clear on several key factual points. First, for years there has been no defined use, service rules, or assignment mechanism for the 2155-2175 MHz band. Second, in the absence of a defined use, M2Z proposed a plan to use this otherwise fallow spectrum to provide the public with enormous, tangible and quantifiable benefits. Third, for the better part of a year, while awaiting official public notice of the acceptance of M2Z's Application for filing, other parties had ample opportunity, if the interest really existed, to develop innovative proposals of their own for use of this spectrum. Finally, instead of receiving similarly innovative proposals, the Commission has received only "copy-cat" or otherwise dubious applications designed, it seems, not so much to make a case for a license but to attempt to create mutual exclusivity and thereby slow or frustrate M2Z's plan to build a nationwide broadband platform. While the Alternative Proposals facially appear to track M2Z's, they fall short in significant and substantial respects.

In this Motion, M2Z carefully analyzes each of the Alternative Proposals both against its groundbreaking Application and on their individual merit. The results: (1) none of the Alternate Proposals come close to offering the panoply of public interest benefits that M2Z has committed

to provide and (2) each of the parties proposing alternatives appear to have objective weaknesses in their business plans, financing, or prior relationship with the Commission, among other things, that calls the proposals into question.

In comparing the Alternate Proposals to M2Z's Application, we look at a myriad of public interest benefits embedded in the M2Z proposal: (1) the provision of free broadband service on a nationwide basis, at speeds at least 384 kbps down/128 kbps up; (2) a commitment to meet aggressive and unprecedented buildout milestones; (3) a pledge not to accept Universal Service funds; (4) a voluntary obligation to provide filtering of pornographic, indecent, and obscene content on the free service; (5) a commitment to provide public safety entities with free, interoperable broadband service; (6) a commitment to make ongoing spectrum usage payments; (7) the ability to bring new competition from a company without current spectrum assets to the broadband market; (8) the promise of stimulating the economy and other public welfare benefits; (9) a commitment to meet Part 27 interference protection standards and incumbent relocation obligations comparable to those specified for other AWS spectrum; (10) a commitment to advance the Commission's goal of spectral efficiency; (11) a meaningful showing of financial ability; and (12) a commitment to comply with obligations placed on Commercial Mobile Radio Service ("CMRS") carriers.

As explained in great detail below, on each of these criteria, the vast majority of the Alternate Proposals miss the mark. In fact, on several of these issues, *none* of the Alternative Proposals commit to do what M2Z has promised. This is for good reason. The standard set by M2Z's Application is a high one. M2Z has committed to a time-limited construction of a nationwide wireless broadband system that will provide free high-speed service to the public. Never before has a private enterprise proposed a project of this scope so thoroughly invested in

the public interest. M2Z's network will enhance and supplement federal universal service programs, protect children from unsuitable Internet content, promote competition in the broadband and customer equipment markets, enhance public safety communications, generate revenue for the U.S. Treasury, promote efficient spectrum use, and stimulate general economic growth. The Alternative Proposals may, more or less, parrot M2Z's commitments but in the end they offer much less.

Each of the Alternative Proposals has significant and immediately apparent gaps and flaws. Pursuant to Section 309(j) of the Communications Act, the Commission may only accept mutually exclusive applications when doing so advances the public interest. Under the circumstances here, that test has not been met and the Commission need not and should not accept the Alternative Proposals. One may pick up an apple in the market without initially noticing the worm hole, but upon a cursory inspection the rotten apple is immediately tossed away. Though it is nominally still an apple, no additional scrutiny is necessary to determine if it is acceptable.

In addition to examining the Alternative Proposals against M2Z's Application, which has been reviewed and found acceptable for filing, the Alternative Proposals were also examined in light of the public information available on the individual proposal or its sponsor. The result of this analysis finds the following: (1) one party has a defective application and is ill equipped to move forward effectively on this spectrum band (which is the case with Open Range); (2) one party proposes duplicative and unnecessary services, the construction of which it likely cannot reliably finance (which is the case for NextWave); (3) one party faces significant financial uncertainty (which is the case for Commnet); (4) one party has been unable to meaningfully live up to its prior build-out commitments to the Commission and is in no financial position to do so

here (which is the case for NetfreeUS); and (5) two parties have filed nothing more than blatant “copy cat” unoriginal proposals that, on their face, suggest a lack of rigor, resolve, and commitment (which is the case for McElroy and TowerStream).

Either prong of M2Z’s analysis leads to the same conclusion – the Commission cannot reasonably find that these alternatives are acceptable for filing.

In any event, the Wireless Telecommunications Bureau cannot lawfully accept the Alternative Proposals, without first giving the Commission an opportunity to render a substantive decision on the Forbearance Petition filed by M2Z in association with its Application. A key point of M2Z’s Forbearance Petition is that the public interest benefits of M2Z’s pending application obviate the acceptance of other applications. If the Bureau were to accept the Alternative Proposals, it would inappropriately prejudge the Forbearance Petition by creating precisely the mutual exclusivity that M2Z has asked the Commission to avoid through its broad forbearance authority. Accordingly, until the full Commission rules on the merits of M2Z’s Forbearance Petition and its related Application, the Bureau should dismiss the Alternative Proposals and decline to accept additional applications for licenses in the 2155-2175 MHz band.

Moreover, in light of the lack of adequate alternative proposals, the paucity of genuine legal arguments (as explained in our companion Opposition) and the impending Section 7 deadline of May 5, 2007, the Commission should immediately take up this matter and approve M2Z’s Application either directly or through its forbearance authority.

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File No. _____

and)

NETFREEUS, LLC)

WT Docket No. _____

Application for License and Authority to
Provide Wireless Public Broadband Service in
the 2155-2175 MHz Band)

File No. _____

and)

MCELROY ELECTRONICS
CORPORATION)

WT Docket No. _____

Application for a Nationwide 2155-2175 MHz
Band Authorization)

File No. _____

and)

TOWERSTREAM CORPORATION)

WT Docket No. _____

Application for a Nationwide 2155-2175 MHz
Band Authorization)

File No. _____

To: Chief, Wireless Telecommunications Bureau

**CONSOLIDATED MOTION OF M2Z NETWORKS, INC.
TO DISMISS ALTERNATIVE PROPOSALS**

Pursuant to Section 308(a) of the Communications Act of 1934, as Amended (the "Act"),¹ and Sections 1.41 and 1.934 of the rules of the Federal Communications Commission ("FCC" or "Commission"),² M2Z Networks, Inc. ("M2Z") respectfully submits this Consolidated Motion to Dismiss ("Motion") against the following alternative proposals filed in the above-referenced proceedings:³

¹ 47 U.S.C. § 308(a).

² 47 C.F.R. §§ 1.41 & 1.934.

³ Rather than moving to dismiss each application in a separate pleading, M2Z submits this consolidated Motion against all of the proposals in the interest of administrative efficiency. This consolidated Motion allows M2Z to organize its arguments in a manner that eliminates any duplication, thereby facilitating the Commission's review of the issues and minimizing the

- Application of Open Range Communications, Inc. ("Open Range") for License to Construct and Operate Facilities for the Provision of Rural Broadband Radio Services in the 2155-2175 MHz Band (the "Open Range Proposal");⁴
- Application of NextWave Broadband Inc. ("NextWave"), for License and Authority to Provide Nationwide Broadband Service in the 2155-2175 MHz Band License (the "NextWave Proposal");⁵
- Application of Commnet Wireless, LLC ("Commnet") for License and Authority to Construct and Operate a System to Provide Nationwide Broadband Radio Service in the 2155-2175 MHz Band (the "Commnet Proposal");⁶
- Application of NetfreeUS, LLC ("NetfreeUS") for License and Authority to Provide Wireless Public Broadband Service in the 2155-2175 MHz Band (the "NetfreeUS Proposal");⁷

burden on the Commission and all parties to this proceeding. *See, e.g., Amendment of Parts 1, 21, 73, 74 and 101 of the Commission's Rules to Facilitate the Provision of Fixed and Mobile Broadband Access, Educational and Other Advanced Services in the 2150-2162 and 2500-2690 MHz Bands, Order, 21 FCC Rcd 8731, ¶ 4 (WTB 2006)* ("We find that filing consolidated oppositions and replies would be more efficient for interested parties and the Commission staff and would enable the issues to be analyzed more quickly . . ."); *Amendment of Parts 1, 21, 73, 74 and 101 of the Commission's Rules to Facilitate the Provision of Fixed and Mobile Broadband Access, Educational and Other Advanced Services in the 2150-2162 and 2500-2690 MHz Bands, Order, 20 FCC Rcd 1606, ¶ 5 (WTB 2005)* ("We agree that permitting interested parties to . . . file consolidated oppositions and replies instead of individual oppositions and replies would not only reduce the amount of paper filed, but would also assist Commission staff in analyzing the issues . . .").

⁴ *See* Application of Open Range Communications, Inc. for License to Construct and Operate Facilities for the Provision of Rural Broadband Radio Services in the 2155-2175 MHz Band, WT Docket No. 07-16 (filed Mar. 2, 2007) ("Open Range Proposal").

⁵ *See* Application of NextWave Broadband Inc. for License and Authority to Provide Nationwide Broadband Service in the 2155-2175 MHz Band, WT Docket No. 07-16 (filed Mar. 2, 2007) ("NextWave Proposal").

⁶ *See* Application of Commnet Wireless, LLC for License and Authority to Construct and Operate a System to Provide Nationwide Broadband Service in the 2155-2175 MHz Band, WT Docket No. 07-16 (filed Mar. 2, 2007) ("Commnet Proposal"). M2Z defined what constitutes Nationwide Broadband Radio Service in its Application. As explained below, what Commnet proposes is something far less than Nationwide Broadband Radio Service and its caption to the contrary is incorrect.

⁷ *See* Application of NetfreeUS, LLC for License and Authority to Provide Wireless Public Broadband Service in the 2155-2175 MHz Band, WT Docket No. 07-16 (filed Mar. 2, 2007) ("NetfreeUS Proposal").

- Application of McElroy Electronics Corporation ("McElroy") for a Nationwide 2155-2175 MHz Band Authorization (the "McElroy Proposal");⁸ and
- Application of TowerStream Corporation ("TowerStream") for a Nationwide 2155-2175 MHz Band Authorization (the "TowerStream Proposal")⁹ (collectively referred to herein as the "Applicants" and the "Alternative Proposals").

For the reasons discussed herein, the Alternative Proposals should be promptly dismissed as defective and insufficient and not accepted for filing.¹⁰ Moreover, consideration of the Alternative Proposals will divert precious Commission resources to these insubstantial filings, prejudice M2Z's forbearance petition, and result in unnecessary delay in processing M2Z's pending Application for License and Authority to Provide a National Broadband Radio Service in the 2155-2175 MHz Band (the "M2Z Application").¹¹ Accepting the Alternative Proposals for filing will therefore disserve the public interest.

At the outset, contrary to assertions of some of the Applicants, none of the Alternative Proposals are mutually exclusive with the M2Z Application. For example, NextWave states that

⁸ See Application of McElroy Electronics Corporation for a Nationwide 2155-2175 MHz Band Authorization, WT Docket No. 07-16 (filed Mar. 2, 2007) ("McElroy Proposal").

⁹ See Application of TowerStream Corporation for a Nationwide 2155-2175 MHz Band Authorization, WT Docket No. 07-16 (filed Mar. 15, 2007) ("TowerStream Proposal").

¹⁰ M2Z has an interest in the disposition of the alternative proposals filed in this proceeding because it has an Application, which has been accepted for filing, for a license to operate in the 2155-2175 MHz band on a nationwide exclusive basis. The Applicants seek to use the same spectrum band for which M2Z previously has applied. As such, M2Z is a party in interest in this proceeding and in any proceeding established to dispose of the alternative proposals for the 2155-2175 MHz band. See Affidavit of Uzoma C. Onyeije, attached hereto as Exhibit A.

¹¹ See Application of M2Z Networks, Inc. for License and Authority to Provide a National Broadband Radio Service in the 2155-2175 MHz Band (filed May 5, 2006) ("M2Z Application"). The M2Z Application was amended on September 6, 2006, to incorporate by reference M2Z's subsequently filed petition for forbearance. See Petition of M2Z Networks, Inc. for Forbearance Under 47 U.S.C. § 160(c) Concerning Application of Sections 1.945(b) and (c) of the Commission's Rules and Other Regulatory and Statutory Provisions, WT Docket No. 07-30 (filed Sept. 1, 2006) ("M2Z Forbearance Petition"). The Application also was amended on March 1, 2007 to provide updated information pursuant to Section 1.65 of the Commission's rules. See 47 C.F.R. § 1.65.

its proposal is “mutually exclusive” with the M2Z Application because M2Z has requested an exclusive license in the 2155-2175 MHz band, whereas NextWave has requested a non-exclusive license in the same spectrum.¹² However, mutual exclusivity does not arise merely by the filing of two applications that cannot both be granted as NextWave and other Applicants imply. Rather, under both the Act and Commission precedent, mutual exclusivity would be triggered only if one or more of the Alternative Proposals were accepted for filing.¹³ Thus, only the Commission, and not the Applicants, may determine the existence of mutual exclusivity. As discussed in detail below, acceptance of the Alternative Proposals is not warranted and indeed would be inconsistent with the public interest.

I. THE FUNDAMENTAL TASK FOR THE COMMISSION IS TO DETERMINE THE HIGHEST AND BEST USE FOR THE 2155-2175 MHZ BAND

A. In May 2006, M2Z Presented the Commission with a Transparent, Innovative, and Consumer Welfare Enhancing Use for the 2155-2175 MHz Band.

Nearly one year ago, M2Z proposed in its Application to make available free broadband Internet access to nearly every consumer, business, non-profit, and public safety entity in the

¹² See NextWave Proposal at 7 and n.2.

¹³ See 47 U.S.C. § 309(j)(1) (“If, consistent with the obligations described in paragraph (6)(E), mutually exclusive applications *are accepted* for any initial license or construction permit, except as provided in paragraph (2), the Commission shall grant the initial license or permit to a qualified applicant through a system of competitive bidding that meets the requirements of this section.”) (emphasis added). Likewise, Commission decisions discussing mutual exclusivity tie it to applications that are “accepted for filing.” See, e.g., “Auction of FM Broadcast Construction Permits Scheduled for March 7, 2007,” Public Notice, DA 06-2448 (rel. Nov. 2, 2006) (when two or more short-form applications specifying the same FM allotment are accepted for filing, mutual exclusivity exists for auction purposes); “Closed Auction of 400 MHz Air-Ground Radiotelephone Service Licenses Scheduled for August 23, 2006,” Public Notice, DA 06-388 (rel. Mar. 3, 2006) (if only one short-form application is accepted for filing for a particular license, that license will be removed from the auction; if more than one short-form application for a license is accepted for filing, mutual exclusivity for auction purposes will have been established, even if only one applicant submits an upfront payment).

United States—the National Broadband Radio Service (“NBR”)”.¹⁴ To make this service possible, M2Z filed an application for an exclusive, nationwide license using 20 MHz in the largely unoccupied, unpaired spectrum at 2155-2175 MHz.¹⁵ Further, M2Z assumed specific and enforceable public interest obligations, including, among others: (1) rapid deployment of its free network in accordance with strict construction benchmarks; (2) mandatory filtering of obscene and/or indecent material; (3) provision of a free interoperable wireless broadband platform for public safety organizations; and (4) a voluntary five percent revenue-based spectrum usage fee paid to the U.S. Treasury annually.¹⁶ In turn, a broad range of public economic benefits will flow from M2Z's new offering, including: reduced universal service spending, reduced spending on network services by public safety entities, more competitive markets for broadband services, and the stimulation of billions of dollars in economic growth by the U.S. economy.

The benefits of M2Z's NBR have been noted and lauded by hundreds of public commenters, many in advance of official public notice of the Application. In particular, these parties have identified wide-ranging public interest benefits that the M2Z Application, when granted, will generate including: (1) bolstering the competitiveness of small and independent businesses;¹⁷ (2) creating a more competitive broadband marketplace,¹⁸ (3) increasing diversity

¹⁴ See M2Z Application at 22-32.

¹⁵ See *id.* at 15-19.

¹⁶ See *id.* at 22-26.

¹⁷ See Comments of the California Association of Local Economic Development, WT Docket Nos. 07-16 & 07-30 (filed Feb. 14, 2007) (widespread governmental interest in deploying broadband stems from recognition that broadband access fosters economic development; M2Z's innovative proposal will help the government expand broadband access using private funds); Amicus Curiae Comments of the Minority Media and Telecommunications Council, WT Docket Nos. 07-16 & 07-30 (filed Mar. 1, 2007) (positing that Internet is crucial to the success of all small and independent businesses, which account for over 99% of all companies, and asserting

in management and ownership of communications outlets;¹⁹ (4) enhancing educational opportunities,²⁰ (5) bridging the digital divide,²¹ (6) supplementing and enhancing public safety

that “a free, nationwide broadband Internet access service would extend the potential of e-commerce to all businesses.”)

¹⁸ Comments of the Electronic Retailing Association, WT Docket Nos. 07-16 & 07-30 (filed Feb. 6, 2007 & Feb. 27, 2007) (states that only 35% of small businesses currently have websites and only 57% use the Internet for business related activities. “This further exemplifies the need for affordable, reliable solutions to the significant, and often times insurmountable, cost of broadband connectivity.”); Amicus Curiae Comments of the Minority Media and Telecommunications Council, WT Docket Nos. 07-16 & 07-30 (filed Mar. 1, 2007) (relates the necessity of readily available broadband access for small and independent businesses to remain successful in an increasingly electronic world); Comments of Center for the Digital Future, WT Docket No. 07-16 (filed Feb. 27, 2007) (with increased competition and subsequent lower prices for broadband, more people chose broadband internet over dial-up.).

¹⁹ Amicus Curiae Comments of the Minority Media and Telecommunications Council, WT Docket Nos. 07-16 & 07-30 (filed Mar. 1, 2007) (“[w]ith one of the most diverse ownership and management teams of any communications business,” M2Z is “a model of diversity for other communications businesses to follow”).

²⁰ Comments of the National PTA, WT Docket No. 07-16 (filed Mar. 1, 2007) (M2Z’s proposal is an “innovative and equitable way to ensure that broadband is an educational resource available to all Americans – parents, children and educators.”); Comments of the Higher Education Wireless Access Consortium, WT Docket Nos. 07-16 & 07-30 (filed Feb. 28, 2007) (supports M2Z’s proposal stating that it will help bridge the gap of wireless connectivity in the classrooms of those schools with fewer resources); Comments of the League for Innovation in the Community College, WT Docket Nos. 07-16 & 07-30 (filed Feb. 28, 2007) (while computer and Internet access has increased, there still remains a substantial information divide. “[T]here are still communities that do not have adequate access to the Internet and technology-based training, resources, and services.”); Comments of the College Parents of America, WT Docket Nos. 07-16 & 07-30 (filed Feb. 28, 2007) (with the cost of colleges rising faster than “income, consumer prices, or even health insurance,” a free broadband service would provide great financial relief to struggling parents. It would also allow for more students to participate in distance learning programs.); Comments of Educause, WT Docket No. 07-16 (filed Feb. 28, 2007) (a free nationwide Internet service would be beneficial to students, as well as all Americans. “In particular, the widespread availability of affordable broadband communications would make both campus-based and distance learning more accessible and effective.”).

²¹ Comments of the Association of Community Organizations for Reform Now, WT Docket Nos. 07-16 & 07-30 (filed Feb. 6, 2007 & Feb. 27, 2007) (current Internet providers are more interested in the bottom line through service to wealthier Americans with high monthly subscription rates. M2Z’s proposal would not only fix the problem of availability with the digital divide, it would fix the affordability component.); Comments of One Economy Corporation, WT Docket Nos. 07-16 & 07-30 (filed Mar. 1, 2007) (“[w]e believe that this type of market innovation will further One Economy’s mission, benefit an underserved portion of our

communications,²² (7) promoting spectral efficiency,²³ and (8) protecting children from objectionable online materials,²⁴ among many other benefits. Moreover, as demonstrated in the study performed by Professor Simon Wilkie, M2Z's entry into the broadband marketplace will increase consumer welfare by up to 25 billion dollars.²⁵

On January 31, 2007, the Wireless Telecommunications Bureau (the "Bureau") released a Public Notice announcing that M2Z's Application was accepted for filing (the "M2Z Application Public Notice").²⁶ On March 2, 2007, in response to the M2Z Application Public Notice,²⁷ five

country, and serve the public interest."); Comments of Center for the Digital Future, WT Docket No. 07-16 (filed Feb. 27, 2007) ("The granting of M2Z's application will so much to end the great broadband divide . . .").

²² Comments of the National Troopers Coalition, WT Docket Nos. 07-16 & 07-30 (filed Feb. 6, 2007 & Feb. 27, 2007) ("M2Z's proposed network will provide another layer of redundancy to bolster existing and planned public safety-operated networks and help law enforcement stay operational in disasters.").

²³ Comments of Alion Science & Technology, WT Docket Nos. 07-16 and 07-30, at 2 (submitted Mar. 2, 2007) ("Alion Science & Technology Comments") (concluding, after review of M2Z's proposal, that "M2Z's proposed network will use the most spectrally efficient technologies that are currently available for commercial radio systems").

²⁴ Comments of Internet Keep Safe Coalition, WT Docket Nos. 07-16 & 07-30 (filed Mar. 1, 2007) (expresses approval of M2Z's network-level filtering of indecent and pornographic material); Comments of Enough is Enough, WT Docket Nos. 07-16 & 07-30 (filed Mar. 13, 2007) (M2Z has developed "an innovative balance" between rapid deployment of broadband internet and "protecting children and families from on line pornography and sexual predators"); Comments of Most Reverend Paul S. Loverde, Bishop of Arlington, WT Docket Nos. 07-16 & 07-30 (filed Mar. 2, 2007) (filtering at the network level will help families protect themselves from indecent online material. "Furthermore, this service will offer the great educational benefits of the Internet to families in a much safer way than is currently available.").

²⁵ See Simon Wilkie, PhD., "The Consumer Welfare Impact of M2Z Network Inc.'s Wireless Broadband Proposal," WT Docket Nos. 07-16 & 07-30 (filed Mar. 2, 2007) (conservatively estimating the net present value of the consumer welfare benefits of M2Z's NBRS at \$18 - \$25 billion, including a reduction in broadband prices due to increased competition, greater access to free broadband service, and royalty payments to the U.S. Treasury from premium subscriber fees) (the "Wilkie Consumer Welfare Study").

²⁶ See "Wireless Telecommunications Bureau Announces that M2Z Networks Inc.'s Application for License and Authority to Provide a National Broadband Radio Service in the 2155-2175

Applicants filed their Alternative Proposals advocating various uses of the 2155-2175 MHz band. On March 9, 2007, the Commission issued another Public Notice (the "March Public Notice") establishing a pleading cycle which extended²⁸ the date for petitions to deny, and other filings pertaining to the Application.²⁹ In response to the March Public Notice, one more party filed an Alternative Proposal. Taken together, the Alternative Proposals, however, stand in stark contrast to the M2Z Application. Unlike the Alternative Proposals, which merely seek to piggyback on M2Z's groundbreaking proposal, the M2Z Application is complete unto itself. M2Z's Application sets forth a specific and complete proposal to provide NBRS, including applicable service rules, interference standards, buildout requirements, licensing conditions, and any and all other criteria against which competing proposals might be measured.³⁰ M2Z also has demonstrated that it is legally, technically, financially, and otherwise qualified to be a Commission licensee.³¹ Finally, M2Z outlined in great detail and depth the concrete public interest benefits that will flow from grant of its Application.³²

MHz Band Is Accepted for Filing," Public Notice, WT Docket No. 07-16, DA 07-492 (rel. Jan. 31, 2007) ("M2Z Application Public Notice").

²⁷ See *id.* at 2 ("additional applications for spectrum in this band may be filed while the M2Z application is pending").

²⁸ The Commission's rules provide that petitions to deny an application subject to Section 309(d) of the Communications Act of 1934, as amended, must be filed no later than thirty days after the date of the public notice listing the application as accepted for filing. See 47 C.F.R. § 1.939(a)(2).

²⁹ "Wireless Telecommunication Bureau Sets Pleading Cycle for Application by M2Z Networks, Inc. to be Licensed in the 2155-2175 MHz Band," Public Notice, WT Docket No. 07-16, DA 07-987 (rel. Mar. 9, 2007) (the "March Public Notice").

³⁰ See M2Z Application at Appendix 2 (Conditions for Grant of M2Z's License and Operation of Its Network).

³¹ See *id.* at 6-8.

³² See *id.* at 22-32.

Although the M2Z Application was not placed on public notice until January, 31, 2007, there has been active public debate regarding the application ever since it was filed, as demonstrated by the wide-ranging views presented in various news stories.³³ Two conclusions flow inevitably from the thorough and transparent nature of the M2Z Application and the public

³³ See *Company Seeks 2155-2175 MHz Band Spectrum to Build Nationwide Broadband Network*, TR Daily, May 12, 2006; Jeremy Pelofsky, *Silicon Valley backs US wireless broadband plan*, Reuters News, May 16, 2006; Ben Hammer, *Group makes play to build \$400M wireless network*, Washington Business Journal, May 22, 2006; Harold Furchtgott-Roth, *Spectrum is Too Valuable to Give Away*, The New York Sun, May 22, 2006 at 10; Steve Rosenbush, *Free Broadband for the Masses; Backed by VC cash, a former FCC official's startup is out to provide no-fee, ad-supported wireless service*, Business Week Online, May 22, 2006; Jeffrey Silva, *Muleta-backed firm seeks free spectrum for national broadband service*, RCR Wireless News, May 22, 2006 at 17; Chuck Taylor, *M2Z Proposes Free Radio Spectrum*, Billboard Radio Monitor, May 23, 2006; *Copps Says FCC Should Get More Involved in Creating Security, Broadband Policy*, TR Daily, May 23, 2006; Matt Marshall, *Start-up plans U.S. network for free wireless broadband*, The Mercury News, May 23, 2006 at BU1; Matt Richtel, *Company Asks U.S. to Provide Radio Space for Free Internet*, New York Times, May 23, 2006 at C3; Natali Del Conte, *Startup Pitches Free, Nationwide Wireless Broadband; National Free Wireless Broadband Proposed*, ExtremeTech.com, May 24, 2006; Matt Richtel, *Free Web access? Firm pushes broadcast model*, International Herald Tribune, May 25, 2006 at 13; *Does M2Z's Broadband Petition Give The FCC More Options?*, Telecom Policy Report, May 29, 2006; Michael Rau, *Free Wi-Fi Access for All is Good Idea*, Daily Press (Newport News, VA), May 29, 2006 at C8; *USA – M2Z Plans Free Wireless Broadband for the US Public*, Tarifica Alert, May 30, 2006; *Firm Wants 20 MHz of Spectrum To Build Broadband Network*, Telecommunications Reports, June 1, 2006; *Test-Bed Proposal Imperils Spectrum Incumbents, FCC Told*, Communications Daily, July 26, 2006; Lynette Luna, *Winds of Change*, Mobile Radio Technology, Aug. 1, 2006 at 14; Cyren Call, *M2Z Prepared to Peacefully Coexist if Necessary*, Communications Daily, Aug. 10, 2006; *Fresh Companies, Fresh Ideas*, InformationWeek, Aug. 14, 2006 at 23; *Need for Interoperability and Broadband, 800 MHz Band Concerns Among Hot Topics at APCO Conference*, Telecommunications Reports, Aug. 15, 2006; *Wireless Industry Representatives, State Commissioners Disagree on Preemption*, TR Daily, Sept. 13, 2006; *New Group to Fight for Auctions, Against 'Sweetheart Deals'*, Communications Daily, Sept. 29, 2006; *FCC Seeks Comments on Cyren Call Plan; CTIA Reiterates Objections to Proposal*, TR Daily, Oct. 31, 2006; Ben Hammer, *FCC Denies Group's Request for Rights to Public Airwaves*, Washington Business Journal, Nov. 13, 2006; *NARUC Panelists Debate Best Path to Ubiquitous Broadband*, TR Daily, Nov. 15, 2006; Naomi Synder, *Tech Experts Gaze into 2007 and Beyond*, The Tennessean (Nashville, TN), Dec. 30, 2006 at 1E; Jon M. Peha, *Improving public safety communications: today's system puts the lives of first responders and the public at risk. What's needed is a nationwide broadband network, and policymakers now have a perfect opportunity to act*, Issues in Science and Technology, Jan. 1, 2007 at 61.

debate surrounding it. First, the initiation of a further rulemaking is unnecessary, counter-productive, and would be, no doubt, duplicative. Second, and more to the point, M2Z's proposal for NBRs at 2155-2175 provided an opportunity for those with comparable or potentially superior proposals to come forth and have their approach tested against the M2Z benchmark. None of the Alternative Proposals can pass that test.

In context, the Alternative Proposals are dwarfed by the overwhelming public interest showing in the record of the companion M2Z proceedings, and do not purport to offer the level of service M2Z has proposed to provide to the nation. Moreover, as explained below, accepting the Alternative Proposals for filing would be inconsistent with: (1) the Commission's threshold obligations to identify the highest and best uses of the 2155-2175 MHz band, (2) the Commission's obligations concerning M2Z's pending forbearance petition, and (3) the public interest. For these reasons, the Alternative Applications should be dismissed with prejudice and not accepted for filing.

B. For Several Years, There Has Been No Defined Use, Service Rules, or Licensing Mechanism for the 2155-2175 MHz Band.

The great aims of the FCC are not to issue rules, preside over disputes among competing interests, or restrain, through enforcement proceedings, recalcitrant licensees. These and the other quotidian pursuits of the agency are merely the instruments of policy. Rather, the highest calling for the FCC is articulated in Section 1 of the Commission's organic Act: to "[m]ake available, so far as possible, to all the people of the United States . . . a rapid, efficient, Nation-wide, and world-wide wire and radio communication service with adequate facilities at reasonable charges."³⁴ In the area of spectrum management, the Commission's *raison d'être*

³⁴ 47 U.S.C. § 151.

requires a single-minded focus on assigning spectrum to those who will put it to the highest and best use, and do so with alacrity.

Grant of M2Z's Application, which calls for designation of 2155-2175 MHz to NBRS and a license for M2Z to provide nationwide service in the band, would allow the FCC to tap into a rich vein of public interest benefits in a band where few were expected to be found. In its Application, M2Z proposed to construct a nationwide broadband wireless network that will reach 95% of U.S. households, just ten years after M2Z deploys its network, in a band of spectrum heretofore badly underused. Like James Marshal's discovery of gold at Sutter's Mill, however, M2Z's proposal has spawned follow-on prospectors and speculators who, with wild-eyed dreams of the mother-lode, can offer nothing at present but fool's gold. The Commission should not allow these "claim-jumpers" to further delay the use and utilization of this valuable national resource.

The recent history of the 2155-2175 MHz band demonstrates, if nothing else, that swift and decisive action is needed if the potential of this band is to be realized in the first quarter of the Twenty-First Century. As many as fifteen years ago, the Commission began deliberations on a permanent allocation for large segments of the 2 GHz band.³⁵ At the time, initial consideration was being given to allocating the spectrum for third generation ("3G") wireless technologies. Although an incumbent licensee petitioned to defer action in the band,³⁶ the Commission reallocated a large portion of the 2 GHz band to PCS.³⁷ That action, however, did not resolve the use of 2155-2175 MHz and, nearly a decade later, the Commission was prevailed upon to issue

³⁵ See *Redevelopment of Spectrum to Encourage Innovation in the Use of New Telecommunications Technologies*, Notice of Proposed Rulemaking, 7 FCC Rcd 1542 (1992).

³⁶ See *id.* ¶¶ 7-8.

³⁷ See *id.* (reallocating 1850-1910/1930-1990 MHz to PCS from fixed microwave services).

an NPRM asking, among other things, whether 2110-2170 MHz would be suitable for 3G services.³⁸ Now, yet six more years later, and although a number of large incumbent wireless operators have supported speedy reallocation of the 2155-2175 MHz band for advanced wireless services,³⁹ the band remains devoid of permanent occupants (all current incumbents have been ordered to relocate to other bands as soon as practicable) and no final plan for future use of the band has been adopted.⁴⁰ Compounding the difficulty of assigning the band is the fact that 2155-2175 MHz is unpaired spectrum and therefore not suitable for the services typically offered by many wireless providers. As explained in the M2Z Application, “this band is essentially an unpaired, undefined, and uncluttered block of spectrum in need of a long-term useful occupant.”⁴¹ M2Z’s unpaired service proposal using TDD technology would make immediate use of the untapped potential at 2155-2175 MHz.

³⁸ *Amendment of Part 2 of the Commission's Rules to Allocate Spectrum Below 3 GHz for Mobile and Fixed Services to Support the Introduction of New Advanced Wireless Services, Including Third Generation Wireless Systems, Petition for Rulemaking of the Cellular Telecommunications Industry Association Concerning Implementation of WRC-2000: Review of Spectrum and Regulatory Requirements for IMT-2000*, Notice of Proposed Rulemaking and Order, 16 FCC Rcd 596, ¶¶ 50–57 (2001) (“Implementation of WRC-2000 Order”).

³⁹ *Petition for Rule Making of the Cellular Telecommunications Industry Ass’n Concerning Implementation of WRC-2000: Review of Spectrum and Regulatory Requirements for IMT -2000* (July 12, 2000) (CTIA Petition); *Petition for Rule Making of the Cellular Telecommunications Industry Ass’n Concerning Implementation of WRC-2000*, RM-9920 (2000) (Comments of Qualcomm Inc.); *Review of Spectrum and Regulatory Requirements for IMT-2000*, RM-9920 (2000) (Comments of AT&T Wireless Services, Inc.); *Review of Spectrum and Regulatory Requirements for IMT-2000*, RM-9920 (2000) (Comments of Verizon Wireless).

⁴⁰ Two types of services occupy the 2155-2175 MHz band – Broadband Radio Service (“BRS”) and Fixed Microwave Service (“FS”). See *BRS R&O* ¶¶ 37-38 (ordering the relocation of users from the 2150-2156 MHz and 2156-2160 MHz bands to 2496-2502 MHz and 2618-2624 MHz respectively); *AWS 8th R&O* ¶¶ 6, 9 (ordering the relocation of users of the Fixed and Mobile Service allocations in the 2155-2160 MHz band and designating the 2155-2175 MHz band for AWS use).

⁴¹ M2Z Application at 16.

C. Ten Months After M2Z's Filing, Six Parties Have Offered Mere Shadow Alternatives for Use of the 2155-2175 MHz Band.

Nearly a year has passed since M2Z filed its Application and, as Spring slips north to Washington once again, the Commission's long awaited public notice of the Application has summoned a gaggle of the usual suspects still looking for spectrum. Yet, these many months later, with all of the time that has elapsed during which any other party could have perfected its proposal, all of the Alternative Proposals, when weighed in the balance against the M2Z Application, are found wanting.

There is, therefore, simply no benefit to the public or to the Commission of entertaining other proposals that cannot, and do not, compare to the Application that M2Z has pending before the Commission. Indeed, given that the Commission already has accepted the M2Z Application for filing, and that M2Z's service will provide public interest benefits that far exceed those offered by the vast majority of Commission licensees, the Commission should establish NBRS, as M2Z has defined it, as the highest, best and only appropriate use of the band. No application to offer services at 2155-2175 MHz should be seriously entertained unless it meets all of the public interest standards set by the M2Z Application, including:

- 1) A commitment to provide free broadband service on a nationwide basis, at speeds of at least 384 kbps down/128 kbps up;
- 2) A commitment to meet buildout milestones comparable to those M2Z has proposed;
- 3) A commitment to not seek Universal Service Funds ("USF") to build and operate its network;
- 4) A commitment to provide filtering of pornographic, indecent, and obscene content on the free service;
- 5) A commitment to provide public safety entities with free, interoperable broadband service;
- 6) A commitment to make ongoing spectrum usage payments;

- 7) The promise of new competition in the broadband market (*i.e.*, the applicant is not an incumbent provider of broadband wireline or wireless service);
- 8) The promise of stimulating the economy and other public welfare benefits;
- 9) A commitment to meet Part 27 interference protection standards and incumbent relocation obligations comparable to those specified for other AWS spectrum;
- 10) A commitment to advance the Commission's goal of spectral efficiency;
- 11) Evidence of the ready availability of at least 400 million dollars to construct a network and commence operations; and
- 12) A commitment to comply with obligations placed on Commercial Mobile Radio Service ("CMRS") carriers.

The Commission has the authority to narrow the scope of the applications it will accept for filing.⁴² Establishing the above criteria as the absolute minimum for a NBRS applicant is appropriate where, as here, the public interest so requires. Accordingly, the Commission should establish criteria limiting the pool of potential applicants to those that will provide service under the same terms and conditions proposed by M2Z. In doing so, each of the Alternative Proposals should be dismissed.

D. When Reviewed in the Context of the Record and Section 7 of the Telecommunications Act, M2Z's Proposed Use of the Band is Far Superior to the Alternative Proposals.

As summarized above, the record is replete with evidence that M2Z has proposed the highest and best use for this spectrum band. Further, and in accordance with Section 7 of the Communications Act, 47 U.S.C. § 157, those whose proposals challenge that of M2Z have the burden of rebutting the presumption that M2Z's Application is in the public interest and must demonstrate that M2Z's Application is, in fact, *inconsistent* with the public interest. As all of the Applicants have either explicitly opposed grant of the Application or proposed that the band be

⁴² The Commission has the authority to establish a preference for applicants that meet certain criteria. *See, e.g., Hispanic Information & Telecommunications Network, Inc. v. FCC*, 865 F.2d 1289 (D.C. Cir. 1989).

used for some inferior offering, each of the Applicants has challenged the grant of M2Z's Application and must therefore rebut the presumption that grant of the Application is in the public interest. None of the Applicants can bear that burden.

Section 7 of the Act provides that the Commission "shall determine whether any new technology or service proposed in a petition or application is in the public interest within one year after such petition or application is filed."⁴³ This statutory provision was enacted to: (1) "encourage the availability of new technology and services to the public"; (2) prevent the Commission from "hamper[ing] the development of new services"; and (3) allow "the forces of competition and technological growth [to] bring many new services to consumers."⁴⁴

As Congress recognized when it enacted the statutory provision, a "major reason for delays in authorizing new services is the fact that competitors to the companies proposing to offer the new service, not wanting to see increased competition, file in opposition to new services."⁴⁵ Along these lines, Congress also made it explicitly clear that "the intent of [Section 7 is] to preclude the Commission from considering the claim of adverse economic effect on an existing licensee when such claim is raised" against a petition or application proposing a new service or technology.⁴⁶

⁴³ 47 U.S.C. § 157(b). Over the years, the Commission repeatedly has invoked Section 7 to promote "innovative policies and licensing models that seek to increase communications capacity and efficiency of spectrum use, and make spectrum available to new uses and users." *Promoting Efficient Use of Spectrum Through Elimination of Barriers to the Development of Secondary Markets*, 18 FCC Rcd 20604 (2003); see also *Application of Hye Crest Management, Inc. for License Authorization in the Point-to-Point Microwave Radio Service in the 27.5 to 29.5 GHz Band and Request for Waiver of the Rules*, 6 FCC Rcd 332 (1991).

⁴⁴ Extended Remarks of Hon. John R. Dingell on Amendments to H.R. 2755, 130 Cong. Rec. E74 (Jan. 24, 1984).

⁴⁵ *Id.* at E73.

⁴⁶ *Id.*